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Environmental Destruction in the Name of National Security:

Will the Old Paradigm Return in
the Wake of September 11?

By Nancye L. Bethurem☛

I. Introduction.

The rolling hills are covered with high green grass waving in the breeze, flowing down to the glorious white sand beach and the blue glassy sea. A crocodile lurks beneath the algae-covered water of the swamp and then slides away. A stream babbles through the rain forest while light filters through the bamboo. The birds loudly proclaim the morning sun. Then director Terrence Malick juxtaposes the war atop these images of paradise, quickly jarring the viewer back to the destructiveness and violence of humankind. Just over the ridge of four-foot high grass, across the clearing in the rain forest, the soldiers of C-company prepare to battle for the top of the hill on the Solomon Islands, and the beauty of nature and the closeness of death both openly greet them. This is war, World War II, to be exact, and the movie, *The Thin Red Line*, is an adaptation of James Jones' novel of the battle of Guadalcanal.¹

What price the environment, the tranquility and the beauty of the world, when war enters? Under Malick's direction, this WWII "war story" creates a strong awareness of the natural and cultural environment in which the battle between men occurs. The film presents a vicious mechanized battle occurring in an exquisitely beautiful and pristine wilderness, where the forces of destruction visually collide with a people living in quiet

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1. *THE THIN RED LINE* (directed by Terrence Malick; screenplay by Terrence Malick; based upon a novel by James Jones; released by Fox 2000 Pictures and Phoenix Pictures, in association with George Stevens, Jr., a Geisler • Roberdeau production 1998). Mark O'Hara at http://www.movie-page.com/reviews/t/thin_red_line.htm (last visited March 24, 2002).

harmony with their natural surroundings, the Melanesians of the Solomon Islands.² As the battle for the hill is underway, the camera focuses upon the beautiful flowering greenery, invoking a tremendous sense of longing to roll childlike in the grass, at which point the viewer is startlingly brought back to the horror of the war with visions of men bleeding, retching, and dying. The movie shows the horrible reality of modern combat, focusing on the devastation wreaked upon individual men in the midst of the most glorious scenery imaginable. One is reminded that World War II, though often glorified and its purpose just, vividly portrays the brutality and destructiveness of humankind.³

While director Malick's focus in the movie was not the destruction of the environment caused by warfare, he expertly uses the beauty and tranquility of the natural environment to provide stark visual and emotional contrast to increase the horror, violence and destructiveness of human beings at war. In addition to focusing on the men who were physically and mentally destroyed by the violence, one could not help but realize the destructiveness of the war to the stage upon which that violence was played out.

The environmental impacts of war, and of preparing for war, are enormous. While the United States has been fortunate in the past century to have only minimal environmental damage at home because of warfare,⁴ battles "overseas" in which the United States has participated have caused extensive environmental damage. From the destruction of for-

ests, rivers, harbors, and islands during World War II, to the defoliation of the forests in Vietnam and the oil fires of Kuwait, all major wars of the 20th century, as well as current conflicts like Kosovo and Somalia, have included the environment as a hidden casualty. Unexploded weapons, polluted rivers, contaminated soil, and damaged landscapes have all harmed human health and the local ecosystems.⁵

Preparing for war has also been environmentally destructive, with much of that destruction at home. The years of preparing to fight "the Cold War" (1945-1989) have left a legacy of hazardous waste, nuclear contamination, polluted air, water and soil, and resulted in the destruction of natural and cultural resources. The country's need to have a strong military, a strong "national defense," included the need to prepare military armaments and equipment and to conduct military tests and training in the United States. Environmental destruction resulting from military preparedness was an accepted price to be paid for a strong national defense during the Cold War.⁶

More recently, however, there has been an awakening of the need to protect the natural and cultural environment in which the preparation for war occurs. Now that the Cold War is over, a significant conflict has arisen between the needs of the country for a strong national defense and the strong desire for protection of our natural and cultural resources. Where do we, as a nation, draw the line between environmental protection and

2. *The Thin Red Line*, *supra* note 1, at http://www.foxmovies.com/thinredline/htmls/movie_info.html (last visited Jan. 14, 2002).

3. O'Hara, *supra* note 1.

4. With the exception of the attacks by the Japanese Empire on several military bases located on the island of Oahu, territory of Hawaii, on December 7, 1941, the United States has largely escaped direct attack by enemy forces upon its "homeland" this past century.

5. See generally, JAY AUSTIN & CARL BRUNCH, *THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC AND SCIENTIFIC PERSPECTIVES* (2000). Because of the tremendous amount of environmental damage done by war, experts are examining a new framework for existing international laws that would outlaw environmental destruction as a weapon of war. Protocol I to the Geneva Convention and the Envi-

ronmental Modification Convention, both dated 1977, were added to the list of international war laws dating back to 1868, in order to prevent environmental destruction as a weapon of war, but the standards provide virtually no guidance, and the United States has not agreed to Protocol I. The U.S. military services do have handbooks that require commanders to take environmental matters into consideration during wartime. See also, Stephen DYCUS, *NATIONAL DEFENSE AND THE ENVIRONMENT* (1996); Danielle Knight, *Environment-Conflict: Protecting the Environment from War*, World News, June 1998, at http://www.oneworld.org/ips2/june98/20_2_076.html (last visited Nov. 8, 2000); and GLEN PLAT, *ENVIRONMENTAL PROTECTION AND THE LAW OF WAR: A 'FIFTH GENEVA CONVENTION' ON THE PROTECTION OF THE ENVIRONMENT IN TIME OF ARMED CONFLICT* (1992).

6. See, Dycus, *supra* note 5, at 80-124.

national security? Can we have both, or is it an either/or proposition?

In the summer of 2001, those questions were center stage, as a tremendous conflict was building between the military's need to train and test personnel and equipment and the strong public sentiment that the military should "clean up" past military contamination, prevent further contamination and destruction to natural and cultural resources, and discontinue training activities at several environmentally sensitive locations across the country.⁷ "Environmentalists"⁸ sought to increase and strengthen the legal protection of the environment from the military and its training activities, while the military, which felt severely hampered by the constraints of environmental laws, sought to lessen the legal protection of the environment in order to increase its training abilities in order to be prepared to fight and win the nation's wars. A showdown was imminent.

Then, on September 11, 2001, terrorists attacked the Pentagon and the World Trade Center towers by hijacking three commercial passenger planes and flying them into the buildings. More than 3000 people are missing and presumed dead. A fourth commercial passenger plane was hijacked, but crashed into a field in Pennsylvania, killing all aboard.

The United States' response to the September 11, 2001 terrorist attacks has proceeded on several fronts, including military action. On October 7, 2001, on the orders of President Bush, "the United States military

... [began] strikes against terrorist training camps of al Qaeda [the terror network run by Saudi exile Osama bin Laden and suspected of supporting the terrorist attacks of September 11] and military installations of the Taliban regime in Afghanistan."⁹ This "war on terrorism," code-named "Operation Enduring Freedom," continues today.

The horrendous terrorist attacks on America on September 11, 2001, and the resulting military conflict against the Taliban and al Qaeda, may have profoundly impacted the results of the "summer of 2001" policy showdown between the military and environmentalists. Now that the country is focused on the military and the war on terrorism, the line between protection of the environment and a strong national defense may have shifted. There is a growing concern that the shift toward support of the military and a strong national defense may go too far, with significant destructive impact to the environment. Will the old paradigm that existed throughout most of the Cold War era return, where the environment was sacrificed in the name of "national defense," or have we progressed enough in our technological and scientific knowledge and environmental ethics to understand that protection of the environment is as important to the American people as a strong national defense, and that we can and must have both?

We can have both a strong national defense and a strong environmental protection policy. We have advanced in our understand-

7. See Cat Lazaroff, *UN Committee Supports End to U.S. Navy Bombing on Vieques*, Environment News Service (July 13, 2000), at <http://ens.lycos.com/ens/jul2000/2000L-07-13-07.html> (last visited Jan. 14, 2002). Vieques Island, off the coast of Puerto Rico, is one location where the community has requested the discontinuation of military training. A United Nations committee recommends that the organization officially urge the United States to stop military training activities on the island and to return the military lands to Puerto Rico. This island is used by the Navy for military training of the Atlantic Fleet. The Pacific Fleet was required to discontinue training in the 1990's on the Island of Kahoolawe, state of Hawaii, significantly impacting the Navy's training opportunities in the Pacific Ocean, based upon the cultural and natural resources on the island.

8. The use of the term "environmentalist" is a vague and overbroad term that includes many people with different approaches to protecting the environment, but will be

used in this paper as a shorthand term for those persons who support increased enforcement of environmental standards and laws upon the U.S. military. Public interest organizations that have been involved in supporting environmental protection include the Rural Alliance for Military Accountability, EarthJustice Legal Defense Fund, The Nature Conservancy, Sierra Club, Conservation Law Foundation, Environmental Defense Fund, Friends of the Earth, Greenpeace, Military Production Network, Military Toxics Network, National Toxics Campaign Fund, Natural Resources Defense Council, Nuclear Free America, Physicians for Social Responsibility, and the National Wildlife Federation.

9. President George W. Bush, Presidential Address to the Nation (October 7, 2001), at <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> (last visited on Jan. 14, 2002).

ing and knowledge of the importance of a healthy environment, and the American people, while strongly supporting the "war on terrorism," will not allow the type of past environmental destruction that occurred to our nation's natural treasures, the land, air and water of the United States, to happen again. It is not necessary to destroy America in order to defend it.

II. Background: The Environmental Effects of Preparing for War.

A. The Military Need for Testing, Training and other Preparations for War¹⁰

The U. S. military's mission is to fight and win the nation's wars.¹¹ To do that, the military must test and train to fight and must have appropriate equipment for the battle. To be effective, training must provide soldiers, sailors and airmen the opportunities to practice their skills across the full spectrum of operations in combat-like conditions with combat equipment. The training conditions must be realistic, as well as physically and mentally challenging. The military ranges and test and training areas located throughout the United States provide the air, land and sea areas in which the military has the opportunity to develop and improve pro-

ficiency, competence and confidence in the use of sophisticated weapons systems.¹²

The military training ranges and airspace are also used to test military equipment in sophisticated and complicated joint operations. There is no substitute for live fire testing and training for the ability of the United States military to have the skills and equipment necessary to provide for the national defense. A decrease in live fire training and testing opportunities could cause serious degradation to readiness and increase risk to military personnel.

As stated by General Jumper, U.S. Air Force, "Maintaining continued access to our ranges and airspace is absolutely critical; in fact, if our ability to train our aircrews continues to diminish, America will soon lose its only edge in air combat proficiency It is only our superior training that enables our pilots to have the upper hand in air combat. That training depends on the right amount and the right type of ranges and airspace. These areas are national assets that allow the Air Force to test new equipment, develop new tactics, and train our forces to be combat-ready."¹³ Realistic military testing and training, in short, are essential to the national defense.

10. Military preparedness has long been urged as a method for preserving peace. George Washington, in his first address, stated, "To be prepared for war is one of the most effectual means of preserving peace." President George Washington. First Annual Address to a joint session of Congress (Jan. 8, 1790.), at <http://www.virginia.edu/gwpapers/annualmessages/message1.html> (last visited on Jan. 14, 2002).

11. Specifically, the U.S. Air Force's mission is: "To defend the United States and protect its interests through aerospace power," at <http://www.dtic.mil/jv2020/afvision.pdf> (last visited on Jan. 14, 2002). The U.S. Navy's mission is: "Be prepared to conduct prompt and sustained combat operations at sea in support of national strategy," at <http://web.nps.navy.mil/~me/calvano/asnesem/tsld031.htm> (last visited on Jan. 14, 2002). The U.S. Army's mission is: Preserve the peace and security, and provide for the defense of the United States, the Territories, Commonwealths, and Possessions, and any areas occupied by the United States; support national policies; implement national objectives; and overcome any nation responsible for aggressive acts that imperil the peace and security of the United States," at http://www.army.mil/public/mission_vision.htm (last visited on March 24, 2002).

12. The Department of Defense is the steward of approximately 25 million acres of land in the United States, and uses additional air and sea space for military training. *Legacy: Conserving Our Nation's Natural and Cultural Heritage*, U.S. Department of Defense Under Secretary of Defense (Environmental Security), *Legacy Resource Management Program: Protecting, Enhancing, and Conserving Natural and Cultural Resources on DoD Lands at 2* (hereinafter *Legacy Program*), at <http://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Legacy/dodlegacy.html> (last visited on Nov. 8, 2001). See also *Challenges to National Security: Constraints on Military Training: Hearing Before the House Comm. on Government Reform*, 107th Cong. (May 9, 2001) (testimony of Lt. Gen Larry Ellis, Deputy Chief of Staff for Operations and Plans, HQ Department of the Army, Admiral William Fallon, Vice Chief of Naval Operations, and Major General Edward Hanlon, Jr., U.S. Marine Corps, Commanding General, Marine Corps Base Camp Pendleton) (hereinafter *Encroachment Hearings*), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:75041.wais (last visited on Nov. 22, 2002).

13. See *Encroachment Hearings*, *supra* note 12 (testimony of General Jumper, Commander, Air Combat Command, U.S. Air Force), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:75041.wais (last visited on Nov. 22, 2002).

B. The Environmental Effects of Military Testing, Training and Other Preparations for War

Testing and training to fight wars damages the environment. From the minimal impacts caused by digging a fighting position, walking across the ground practicing navigation and maneuver skills, or cutting down trees to build field shelter, to the significant impacts caused by dropping 1000 pound bombs from high altitude planes, burning large tracts of land in connection with the use of flares, white phosphorous or other night training munitions, or the disposal of hazardous waste produced in connection with military operations, preparation of the nation's defense has a cost to the environment.

As an example, throughout the years of the Cold War, from 1945 to 1989, the Department of Defense created large amounts of hazardous wastes, which were "deliberately dumped in unlined pits or landfills, injected into wells, burned in the open air, or left in containers that are now corroded and leaking. The environmental impact of these actions, perfectly legal throughout much of this period, is enormous. So is the cost of cleaning up after them."¹⁴ Another example of environmental destruction from past military preparations was the creation, storage and testing of nuclear weapons for more than forty years, at facilities spread across 2.4 mil-

lion acres in 34 states, by the Department of Energy and its contractors, resulting in pollution of the air, land and waters around the test areas with toxic and radioactive wastes.¹⁵

Along with the environmental impact caused by hazardous waste and nuclear contamination, impacts have included destruction of places of cultural significance to American Indians, Native Hawaiians, and Alaska Natives and other historic properties and locations. These cultural sites and properties have been impacted by use as military training areas. Additionally, species that were later added to the list of threatened and endangered species under the Endangered Species Act¹⁶ were impacted by military training activities and indirectly by modification and destruction of habitat. Today, the military mission's requirements on the Department of Defense's natural and cultural resources are increasing, as are the requirements to comply with environmental protection laws. New weapons systems, involving heavier vehicles and longer-range weapons, intensify environmental impact while increasing the military's need for additional and diversified areas of training, testing and operations.¹⁷ Demands on the land are increasing also due to the return of units from the closing of overseas bases and the dozens of bases that the U.S. has closed or "realigned" in recent years under the Base Closure and Realignment Act.¹⁸

14. Dycus, *supra* note 5, at 94.

15. *Id.* at 5 (citing Department of Defense, Defense and the Environment: A Commitment Made I (1991)). Cleaning up the environmental damage just from the U.S. nuclear weapons program was estimated by the U.S. Department of Defense in 1995 to cost up to \$375 billion and to take 75 years. *Nuclear Legacy*, New Scientist, 15 April 1995, at 11.

16. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (hereinafter ESA). When Congress passed the ESA in 1973, it recognized that many of our nation's native plants and animals were in danger of becoming extinct. Our rich natural heritage was of "esthetic, ecological, educational, recreational, and scientific value to our Nation and its people." ESA's provisions work to conserve and recover species listed as threatened and endangered and to conserve "the ecosystems upon which endangered and threatened species depend." Species may be listed as either "endangered" or "threatened." "Endangered" means a species is in danger of extinction throughout all or a significant portion of its range. "Threatened" means a species is likely to be-

come endangered within the foreseeable future. All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened. As of March 24, 2002, 1,814 species are listed, of which 1,256 are U.S. species. At <http://ecos.fws.gov/tess/html/boxscore.html> (last visited Dec. 7, 2001).

17. One example is that a Civil War battalion required 200 acres of land for training maneuvers, while today's mechanized battalion requires 80,000 acres of land for training maneuvers. Maj Sharon Riley, *The Wolf At the Door: Competing Land Use Values on Military Installations*, 153 Mil. L. Rev. 95, 121 (1996) (citing *Program Manager for Rocky Mountain Arsenal, Special Historical Issue*, 4 Eagle Watch, Aug. 1992, at 8).

18. L. Peter Boice, *Conserving the Department of Defense's Natural and Cultural Resources: Recent Advances, New Challenges*, at <https://denix.cecer.army.mil/denix/Public/ES-Programs/Consrvation/Speeches/fedfac1998.html>. (last visited on Nov. 8, 2001). See also, Base Realignment and Closure Act, 10 U.S.C. § 2687.

III. The U.S. Military Environmental Awakening in the 1990's.

Throughout the "Cold War" era, 1945 to 1989, there was little or no constraint on the activities of the military. National security was of utmost importance, and the existence of the Cold War gave the military tremendous power. The defense budgeting was a matter of "what do we need?"¹⁹ The first two decades of federal environmental laws, 1970-1990, largely passed the military by without significant change in the business of preparing for the nation's defense.

Much of the problem, from a legal standpoint, derived from Congress's lack of clarity about the application of environmental statutes on decisions and activities pertaining to national defense. Federal agencies are not necessarily subject to the same sanctions as other violators of the environmental laws. For example, the concept of sovereign immunity made enforcement of state environmental statutes upon a federal agency

impossible²⁰ and the concept of the "unitary executive" prevented enforcement by EPA upon other federal agencies.²¹ Additionally, military leaders were concerned with preparing the troops to fight wars, and protecting the "bugs and bunnies" while teaching humans to defeat enemy forces was not a priority. Learning to defeat the enemy was.

A revolution in the environmental ethos of the Department of Defense ("DoD") began at a low point of environmental compliance by the military. In 1989, Secretary of Defense Dick Cheney, in response to the criminal conviction of three DoD civilian employees for illegal waste storage and disposal²² and the resulting congressional criticism of the DoD's environmental record,²³ issued a memorandum to the Secretaries of the Army, Navy and Air Force declaring that "the Department of Defense [will] be the Federal leader in agency compliance and protection. We must demonstrate commitment with accountability for responding to the Nation's environmental agenda."²⁴

19. Donald Zillman, *Environmental Protection and the Armed Forces*, 65 Geo. Wash. L. Rev. 309, 314 (Jan 1997) (reviewing Stephen Dycus, *Environmental Protection and the Armed Forces* (1996)).

20. U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992) (suit by the State of Ohio for the Department of Energy's violations of the Federal Water Pollution Control Act (hereinafter *Clean Water Act*) and the Resource Conservation and Recovery Act (hereinafter *RCRA*); court held that unless Congress unequivocally waives the government's sovereign immunity, the government will not be exposed to lawsuits or obligated to pay penalties levied by states for statutory violations; here Congress had not waived sovereign immunity for enforcement of the Clean Water Act or RCRA); the Clean Water Act, 33 U.S.C. §§ 1251-1387, is a 1977 amendment to the Federal Water Pollution Control Act of 1972, which set the basic structure for regulating discharges of pollutants to waters of the United States. The Clean Water Act gives the Environmental Protection Agency (hereinafter EPA) the authority to set effluent standards on a technology basis and continued the requirements to set water quality standards for all contaminants in surface waters. The Clean Water Act makes it unlawful for any person to discharge any pollutant from a point source into navigable waters unless a permit under the National Pollution Discharge Elimination System is obtained. RCRA, 42 U.S.C. §§ 6901-6992k (U.S. Code as of 01/05/99), gave EPA the authority to control hazardous waste from "cradle-to-grave." This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also set forth a framework for the management of non-hazardous wastes. The 1986 amendments to RCRA enabled EPA to address environmental problems that could result from un-

derground tanks storing petroleum and other hazardous substances. Congress later amended RCRA to waive sovereign immunity through passage of the Federal Facility Compliance Act, Pub. L. No. 102-386, in 1992. The primary purpose of the amendment was to ensure that there was a complete and unambiguous waiver of sovereign immunity with regard to the imposition of administrative and civil fines and penalties against federal facilities. This allowed the state environmental agencies and the federal EPA to impose civil penalties and administrative fines on federal facilities under RCRA section 6001 for violations of federal, state and local solid and hazardous waste laws. Congress has not yet amended the Clean Water Act to waive sovereign immunity.

21. Dycus, *supra* note 5, at 41. The "unitary executive" doctrine prevents EPA from issuing administrative compliance orders or filing suit against other federal agencies for violations.

22. U.S. v. Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991) (federal employees were convicted of criminal violations of RCRA for the first time; the Fourth Circuit rejected the argument that sovereign immunity barred the prosecution of federal officials).

23. Kathleen Hicks & Stephen Daggett, *Congressional Research Service Report for Congress, Department of Defense Environmental Programs: Background and Issues for Congress*, March 6, 1996, at 4, at <http://www.cnire.org/NLE/CRSreports/Science/st-4.cfm> (last visited on Jan. 14, 2002).

24. Seth Shulman, *Operation Restore Earth*, *Environment*, March/April 1993, at 38.

The DoD's new "environmental program" was first aimed at the cleanup of existing hazardous and nuclear waste contamination, and then expanded to include the proper compliance with environmental laws enacted to prevent pollution of air, land and sea with hazardous waste and other toxic substances. Finally, the DoD focused upon pollution prevention (source reduction, recycling, phasing-out use of hazardous chemicals in production and maintenance) and protection of natural and cultural resources, including compliance with the ESA²⁵ and the National Historic Preservation Act.²⁶

The DoD's environmental program is now headed by a Deputy Undersecretary of Defense (Environmental Security),²⁷ and the program is organized around four "pillars:" 1) Restoration (clean up of past contamination); 2) compliance (meeting the requirements of environmental pollution laws); 3) Pollution prevention (reduction of hazardous waste production); and 4) Conservation (protection of natural and cultural resources). Environmental planning is a component of each of these pillars.

25. Compliance with the ESA by the U.S. Army at one of its premier bases, Ft. Bragg, reached a low point in 1989-1990, where it had been found in violation of "guidelines" for compliance with the ESA, had received a biological opinion from the U.S. Fish and Wildlife Service that resulted in very restrictive conditions on training, and was on the verge of being sued by the Environmental Defense Fund for violations of sections 7 and 9 of the ESA (for alleged failure to enter into consultations and "takings" of endangered species, respectively). This low point also provided impetus for the new Army policy on protecting biological diversity. Maj David Diner, *The Army and the Endangered Species Act: Who's Endangering Whom?* 143 Mil. L. Rev. 161, 207-208 (1994).

26. The National Historic Preservation Act, 16 U.S.C. §§ 470-470v-1 (hereinafter NHPA) (U.S. Code as of 01/02/01), seeks to preserve historic properties and places. It has two major components that affect the responsibilities of the DoD. Under section 106 of the NHPA, federal agencies are to consider the effects of their undertakings (including the issuance of permits, the expenditure of federal funding and federal projects) on historic resources that are either eligible for listing or are listed on the National Register of Historic Places. Under Section 110 of the NHPA, federal agencies must consider preservation of historic resources as part of their management responsibilities.

A. Environmental Restoration: Cleaning Up Past Contamination

The DoD's environmental restoration pillar is organized around two programs: 1) the Defense Environmental Restoration Program (DERP) and 2) the Base Realignment and Closure (BRAC) environmental restoration program. The goal of these two programs is to reduce, in a cost-effective manner, the risks to human health and the environment attributable to contamination resulting from past DoD activities at active, formerly used, and closing military bases and ranges, while ensuring that the DoD environmental cleanup policy conforms to existing laws and regulations.²⁸ For FY 1994, 1995 and 1996, \$1.96 billion, \$1.48 billion and \$1.42 billion was allocated, respectively, for environmental restoration by the DoD.²⁹ For FY 1997, 1998, 1999, 2000 and 2001, \$1.31 billion, \$1.29 billion, \$1.26 billion, \$1.26 and \$1.26 billion was allocated respectively.³⁰ Funding for environmental aspects of BRAC was \$281.1 million, \$579.4 million, \$547.9 million, \$533.83 million and \$457.1 million for FY 1991 to FY 1996, respectively.³¹ For FY 1997, 1998, 1999, 2000 and 2001, \$661.2, \$818.2, \$676.5, \$360.1 and \$1.9 billion was funded or planned for environmental aspects of BRAC.³²

27. The Office of Deputy Under Secretary of Defense for Environmental Security was created in 1993. Under the current Secretary of Defense, the office is now integrated into the Department of Defense, and does not exist as named, but the mission and the "four pillars" concept remain.

28. DoD Environmental Clean-Up home page, at <http://www.dtic.mil/envirodod/index.html> (last visited on March 24, 2002).

29. Hicks & Daggett, *supra* note 23, at 7. The funding levels are actual for FY 1994, estimated for FY 1995 and requested for FY 1996.

30. Defense Environment Restoration Program FY 1998 Annual Report to Congress, p. 30 (dollars obligated and planned), at <http://www.dtic.mil/envirodod/derpreport98/derphome.html> (last visited on Jan. 20, 2002).

31. Hicks & Daggett, *supra* note 23, at 8. The funding levels are actual for FY 1994, estimated for FY 1995 and requested for FY 1996.

32. Defense Environment Restoration Program FY 1998 Annual Report to Congress, p. 33 (dollars obligated and planned), at <http://www.dtic.mil/envirodod/derpreport98/derphome.html> (last visited on Jan. 20, 2002).

B. Compliance: Meeting the requirements of Environmental Pollution Laws

The goal of the environmental compliance pillar is to maintain full and sustained compliance with all federal, state, and local environmental laws and regulations. Supporting goals include developing and implementing budgeting tools, protecting mission readiness from compromise during the development of laws and regulations, and ensuring that laws and regulations provide achievable protection at a reasonable cost.³³ Funding for FY 1994-FY 1996 was \$2.08 billion, \$2.15 billion and \$2.20 billion, respectively.³⁴ Funding for FY 1997-2002 was \$1.919 billion, \$1.913 billion, \$1.717 billion, \$1.65 billion, \$1.62 billion and \$1.623 billion, respectively.³⁵

C. Pollution Prevention: Reducing Hazardous Waste Production

Pollution prevention programs include efforts to eliminate or reduce pollutants at the source. The DoD's goals for "pollution prevention" are threefold: 1) comply with all legal requirements by promoting pollution prevention as the preferred means of achieving environmental compliance; 2) protect human health and the environment by reducing the use of hazardous materials to as near zero as possible; and 3) reduce costs by integrating cost-effective pollution prevention practices into all DoD operations and activities, while ensuring performance of DoD's

mission.³⁶ Funding for FY 1993-1996 was \$296.3 million, \$355.5 million, \$394.3 million and \$335.5 million, respectively.³⁷ Funding for FY 1997-2002 was \$244,000, \$255,822, \$239,358, \$281,421, \$253,246 and \$245,089, respectively.³⁸

D. Conservation: Protecting Natural and Cultural Resources

To protect the natural and cultural resources of the United States, the DoD has a strong conservation goal: "all DoD conservation programs shall work to guarantee continued access to our land, air, and water resources for realistic military training and testing while ensuring that the natural, and cultural resources entrusted to DoD care are sustained in a healthy condition for scientific research, education and other compatible uses by future generations."³⁹ A significant portion of the activities to meet that goal are funded under the "Legacy Program,"⁴⁰ which has provided funds to identify, manage, restore, and protect significant biological and cultural resources on DoD lands since fiscal year 1991.⁴¹ Specific examples of programs that have been funded by the Legacy Program have included regional ecosystem management initiatives in the Mojave Desert; the San Diego Bay Area; Eglin Air Force Base, Florida; MCB Camp Pendleton, CA; Arnold Air Force Base, Tennessee; the Sonoran Desert; and the Fort Huachuca, Arizona region.⁴² Funding for FY 1991-1996 was \$8.7 million, \$22.51 million, \$122.6 million, \$93.5 million, \$123.25 million

33. DoD Compliance home page, at <https://www.denix.osd.mil/denix/Public/ES-Programs/Compliance/compliance.html> (last visited on Jan. 20, 2002).

34. Hicks & Daggett, *supra* note 23, at 12. The funding levels are actual for FY 1994, estimated for FY 1995 and requested for FY 1996.

35. Defense Environmental Quality Program FY 2000 EQ Annual Report to Congress, Appendix H-2. (FY 2001 is amount appropriated and FY 2002 is amount budgeted), at <https://www.denix.osd.mil/denix/Public/News/OSD/EQ00/home.html> (last visited on March 24, 2002).

36. DoD Pollution Prevention home page, at <https://www.denix.osd.mil/denix/Public/ES-Programs/Pollution> (last visited on March 24, 2002).

37. Hicks & Daggett, *supra* note 23, at 12. The funding levels are actual for FY 1993 and FY 1994, estimated for FY 1995 and requested for FY 1996.

38. Defense Environmental Quality Program FY 2000 EQ Annual Report to Congress, Appendix H-2. (FY 2001 is amount appropriated and FY 2002 is amount budgeted), at <https://www.denix.osd.mil/denix/Public/News/OSD/EQ00/home.html> (last visited on Jan. 20, 2002).

39. DoD Instruction 4715.3, *Environmental Conservation Program*, May 3, 1996, at http://www.dtic.mil/whs/directives/corres/pdf/i47153_050396/i47153p.pdf (last visited on Sept. 23, 2002).

40. Legacy Program, *supra* note 12.

41. DoD Authorization Act, FY 1991, Public L. No. 101-511 § 8120 (1991).

42. Boice, *supra* note 18, at 3.

and \$105 million, respectively.⁴³ Funding for 1997-2002 was \$108 million, \$135.7 million, \$135.5 million, \$164.9 million, \$137.5 million and \$137.7 million, respectively.⁴⁴

E. Planning: Considering Environmental Impacts of Proposed Activities

While not one of the DoD's environmental "pillars," environmental planning is an important component of the DoD's environmental programs. DoD Instruction 4715.9 requires, as a supplement to the requirements of the National Environmental Policy Act⁴⁵ and the Council on Environmental Quality⁴⁶ regulations under 40 CFR §§ 1500-1508, consideration of environmental impacts in all its activities. The Instruction provides that it is DoD policy to: "1. Integrate environmental considerations into DoD plans for defense activities and operations. DoD activity and operational planning should fully consider the environmental consequences of proposed actions in conjunction with national security requirements and other considerations of national policy. 2. Prepare necessary documentation required under NEPA and CEQ regulations whenever a proponent develops a proposal for an action that has the potential for significant environmental impacts and the proponent is actively preparing to make a decision on one or more alternative means of accomplishing that proposal. 3. Integrate environmental considerations into installation master planning and operational planning. 4. Integrate environmental considerations into acquisition programs in accordance with DoD 5000.2-R and DoD Directive 5000.1 and 5. Require the proponent of an action to program for funding of the costs of any environmental

planning and analysis necessitated by the action."⁴⁷

Through these environmental programs, under the leadership of the Department of Defense Deputy Under Secretary of Defense (Environmental Security), substantial progress has occurred in the military's clean up and protection of the environment since 1989.

IV. The Environment v. The Military: The "Summer 2001 Policy Battle" Heats Up.

A. The Military's "Encroachment" Concerns

Summer 2001 was an important time for the DoD. While the DoD had made substantial efforts in cleaning up past waste sites, changing its methods of operation to reduce the production of hazardous waste, using NEPA and other planning techniques to minimize and eliminate destruction of natural and cultural resources, and funding through the Legacy Program, ecosystem study and management projects, the DoD was feeling overburdened by environmental requirements. The challenge of meeting all of the environmental requirements, particularly complying with ESA requirements, was causing the DoD to believe that compliance was lessening the military's ability to meet its security defense requirements. Additionally, urban sprawl had brought cities and people to the front gates of military installations, which were once located in remote areas of the country, and the noise, smoke, and impacts of military activities were now in the middle of large populations. Trying to con-

43. Hicks & Daggett, *supra* note 23, at 15. The funding levels are actual for FY 1991-1994, and estimated for FY 1995. \$145 million was requested for FY 1996. \$105 was funded for FY 1996, at <http://www.denix.ods.mil/denix/Public/News/OSD/EQ96/chapter5/Chap5.html> (last visited on Dec. 10, 2001).

44. DEFENSE ENVIRONMENTAL QUALITY PROGRAM FY 2000 EQ ANNUAL REPORT TO CONGRESS, Appendix H-2 (FY 2001 is amount appropriated and FY 2002 is amount budgeted), at <https://www.denix.osd.mil/denix/Public/News/OSD/EQ00/home.html> (last visited on Jan. 20, 2002).

45. National Environmental Policy Act, 42 U.S.C. § 4321-4370F (hereinafter NEPA) (John Dwyer & Markia

Bergsund, FEDERAL ENVIRONMENTAL LAWS ANNOTATED (2001)), establishes a broad national framework for protecting our environment. NEPA's basic policy is to assure that all federal agencies give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment.

46. The Council on Environmental Quality (hereinafter CEQ), established under NEPA, provides advice and assistance to the President regarding the state of the environment.

47. DoD INSTRUCTION 4715.9, at <https://www.denix.osd.mil/denix/Public/ES-Programs/Planning/Policy/note1.html> (last visited Jan. 20, 2002).

duct military training and operations in close proximity to large populations of people and in compliance with all environmental laws was causing a condition that the military termed "encroachment."

Also, in spite of the progress that the DoD was making in complying with environmental laws, the DoD was under pressure "environmentally" through numerous lawsuits brought against it to enforce compliance with various environmental statutes, including NEPA and ESA. For example, in February 2000, a broad coalition of environmental citizens' groups from around the country, led by the Rural Alliance for Military Accountability and the Center for Biological Diversity,⁴⁸ filed suit in federal district court in Washington, D.C. to force the U.S. Air Force to reevaluate its flight training program and to prepare a programmatic Environmental Impact Statement ("EIS") for its nationwide low level flight training program. The coalition alleged that the Air Force was violating NEPA by failing to comprehensively address the environmental impacts of the program. The lawsuit also sought to halt all Air Force low-level flights until the EIS had been prepared. The plaintiffs alleged the flights are "highly intrusive military flights over many rural, undeveloped areas throughout the nation, including national parks, wilderness areas, national wildlife refuges and wild and scenic rivers." The Air Force countered by saying that the low level flights are necessary to provide effective training for its pilots.⁴⁹

48. The Rural Alliance for Military Accountability and the Center for Biological Diversity are two of the most active environmental groups that seek to ensure compliance by the DoD with environmental laws.

49. "Realistic training is essential for the United States Air Force. It provides the combat edge that enables victory in battle and reduces American casualties." Air Force Statement quoted in Cat Lazaroff, *U.S. Air Force Sued Over Low Level Training Flights*, ENVIRONMENTAL NEWS SERVICE, Feb. 2000, at <http://ens.lycos.com/ens/feb2000/2000L-02-02-06.html> (last visited on Jan. 20, 2002).

50. Keith Rogers, *Watchdog Group Takes on Military*, LAS VEGAS REVIEW-JOURNAL, May 11, 1998, at http://www.lvrj.com/lvrj_home/1998/May-11-Mon-1998/news/7472261.html (last visited on Jan. 20, 2002).

51. Opponents to the expansion plan say the expansion is unnecessary, would destroy thousands of acres of prime wildlife habitat and ruin the area for archaeologists,

The Rural Alliance for Military Accountability has also filed suit to stop a proposed Mountain Home training range, an expansion plan that affects three million acres in Northern Nevada, northwest Idaho and southeast Oregon, and battled plans by the Navy to expand its Fallon Naval Air Range by 120,000 acres.⁵⁰ Other challenges from environmentalists include the Wilderness Society's opposition to the Army's expansion of its training area in the Mojave Desert at Fort Irwin, CA,⁵¹ the request to discontinue use of Vieques Island for military training by the Navy,⁵² and the complaints of neighbors causing the shutdown of several bases, including El Toro Marine Corps Air Station in Southern California, and the Marines giving up training airspace at Camp Pendleton to commercial air traffic.⁵³ Additionally, the military declared part of the Twentynine Palms training ground off-limits because of the presence of the endangered desert tortoise and environmentalists and Native Americans are seeking to end the Air Force's use of the Barry Goldwater Range in Arizona.⁵⁴

These "encroachment issues" caused the U.S. military to seek a solution. One avenue the military pursued was to legislatively expand the exemptions and exceptions contained within several of the environmental laws. This was believed to be one of the best ways to ensure completion of the military training required for the nation's military to be prepared to fight and defend the nation.

biologists and people who want to use the public lands for recreation. The Wilderness Society's director of conservation programs for California and Nevada said that the Army's plans are rooted in the past, stating, "The world has changed. These lands should be committed to wildlife conservation, scientific research and recreation. If the tanks roll south, the desert tortoise population in the west Mojave may have almost no chance of survival." Shaun McKinnon, *Army Plan, Cargo Airport Threaten Desert Tranquillity* (sic), LAS VEGAS REVIEW-JOURNAL, July 5, 1998, at http://www.lvrj.com/lvrj_home/1998/Jul-05-Sun-1998/news/7780104.html (last visited on Jan. 20, 2002).

52. Lazaroff, *supra* note 7, at 1.

53. Keith Rogers, *Across the World, U.S. Military Bases Retreat*, LAS VEGAS REVIEW-JOURNAL, May 20, 2000, at http://www.lvrj.com/lvrj_home/2000/May-20-Sat-2000/news/13609033.html (last visited on Jan. 20, 2002).

54. *Id.*

Most environmental laws already have specific exemptions for the military, to be used where necessary in order to protect the nation. For example, under NEPA, there is a provision that can be invoked when emergency circumstances outside the control of the agency make it necessary to take an action with significant environmental impact without first complying with pertinent regulations. It requires that the action proponent consult with the CEQ regarding alternative arrangements.⁵⁵ Additionally, the ESA contains a "national security exemption" which requires the Endangered Species Committee (a committee composed of various Cabinet and sub-cabinet level officials) to exempt the DoD from the prohibition against jeopardizing the continued existence of a listed species if the Secretary of Defense finds that an exemption is necessary for reasons of national security.⁵⁶

55. 40 CFR § 1506.11. "Emergencies. Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements." Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review. In *Valley Citizens for a Safe Environment v. Vest*, 22 E.L.R. 20335 (D. Mass. 1991), this emergency provision was upheld, when used to allow the Air Force to bring flights into Westover Air Force Base to serve Persian Gulf operations based on CEQ certification of an emergency, a commitment to prepare an Environmental Assessment as soon as possible, and specific military exigencies.

56. ESA Section 7(j): "Exemption for national security reasons. Notwithstanding any other provision of this chapter, the [Endangered Species] Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security." Upon signing the ESA into law, President Carter stated that the DoD should rely on this exemption "only in grave circumstances posing a clear and immediate threat to national security." 16 USC § 1536(j).

57. 36 CFR §§ 78.3 and 78.4. 36.CFR § 78.5 (2002) sets forth that the Secretary of the Interior may reject and terminate the waiver, however.

58. 33 U.S.C. § 1323 (West 2002) requires that the action be in the paramount interest of the U.S. It exempts any effluent source, such as a pipe or a vessel, of any federal agency from compliance with any requirement relating to such source unless they involve the requirements under 33 USC § 1316 (national standards of performance) or § 1317 (toxic and pretreatment effluent standards). The waiver is applicable for one year only, but it can be re-

NHPA allows "emergency undertakings," when a federal agency head determines, under extraordinary circumstances, that there is an imminent threat to the national security such that emergency action is necessary for the preservation of human life or property, and that such emergency actions would be impeded if the federal agency were to concurrently meet its historic preservation responsibilities under § 110 of the Act. In that situation, the agency head may immediately waive all or part of its responsibilities under the NHPA for the period of the emergency, but must notify the Secretary of Interior within 12 days of the waiver action.⁵⁷ National security waivers, exemptions and/or exceptions also exist under the Clean Water Act,⁵⁸ the Air Pollution Prevention and Control Act,⁵⁹

newed. Congress must be notified in January of waivers granted in the preceding year.

59. 42 U.S.C. § 7418(b) (West 2002) authorizes the President to exempt federal agency sources from compliance with Air Pollution Prevention and Control Act requirements "if he determines it to be in the paramount interest of the United States to do so. . . . In addition to any such exemption of a particular emission source, the President may, if he determines it to be in the paramount interest of the United States, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature." The exemption is valid for not more than one year and notification to Congress is required. This exemption does not apply to new source review requirements and special provisions apply to exemptions for hazardous air pollutants. The Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401-7671(q) (West 2002) (hereinafter *Clean Air Act*) is the comprehensive Federal law that regulates air emissions from stationary and mobile sources. This law authorizes the EPA to establish National Ambient Air Quality Standards (NAAQS) to protect public health and the environment. The goal of the Act was to set and achieve NAAQS in every state by 1975. The setting of maximum pollutant standards was coupled with directing the states to develop state implementation plans (SIP's) applicable to appropriate industrial sources in the state. The Act was amended in 1977 primarily to set new goals (dates) for achieving attainment of NAAQS since many areas of the country had failed to meet the deadlines. The 1990 amendments to the Clean Air Act in large part were intended to meet unaddressed or insufficiently

RCRA,⁶⁰ and the Toxic Substances Control Act.⁶¹

Additionally, in connection with complying with environmental laws, the Department of Defense has the option to "classify" certain material, such as NEPA documents, which makes the document unavailable for review by the public, thus eliminating any ability of the public to provide comments on the document. The courts have upheld this "non-public" NEPA compliance, by holding that the need for secrecy outweighs the public's desire to be apprised of the activities of the military. One example of this was the Navy's construction of an ammunition magazine in Hawaii, which might store nuclear weapons. The Supreme Court, when the EIS was challenged for the failure of the Navy to discuss the details of the storage of nuclear weapons, upheld the military's need for secrecy.⁶²

Notwithstanding the existing exemptions, exceptions, waivers and the ability to "classify" material to restrict public access and input, the DoD's concerns with complying with environmental laws continued to increase. In response to these "encroachment" concerns, the United States House of Representatives, Government Affairs Committee, held hearings on May 9, 2001. At the hearings, several of the top commanders of the U.S. military testified to several specific examples where compliance with environmental laws, most notably the ESA, was substantially impacting the ability of the military to properly prepare to defend the country.

addressed problems such as acid rain, ground-level ozone, stratospheric ozone depletion, and air toxics.

60. Section 6001 of RCRA authorizes the President to exempt federal agencies from compliance with RCRA requirements "if he determines it to be in the paramount interest of the United States to do so." A lack of appropriation cannot be the basis for an exemption unless the President specifically requested such an appropriation and Congress failed to make it available. The exemption is valid for not more than one year, but the President may grant additional exemptions for periods not to exceed one year if he makes a new determination. The President must notify Congress of the exemption. 42 U.S.C. § 6961(a).

61. 15 U.S.C. § 2621 requires the EPA Administrator to waive compliance with any provision of the Toxic Substances Control Act upon a request and determination by the President that the requested waiver "is necessary in the

To begin the hearings on May 9, 2001, Representative Dan Burton, Chairman of the Committee on Government Reform, U.S. House of Representatives, stated:

the availability of realistic training is eroding. Defense Department training ranges here and overseas are under siege from the land, the water, the air and the airwaves. From Vieques to San Clemente Island, from Norfolk, Virginia to Camp Pendleton, California, combat training is being hemmed in. It's being hemmed in by commercial development, environmental regulations, airspace restrictions and conflicts over use of the radio frequency spectrum. As development consumes open space around training ranges, compliance with state and federal environmental regulations becomes more complex and more costly. Some Defense Department land has become a haven for endangered species, a habitat of last resort. The burden of protecting wildlife and habitat may be overwhelming the primary training mission. As the amount of land the Defense Department set aside for protected species like the fairy shrimp, the gnat-catcher and the checker-spot butterfly expands, training lands become artificially narrow. Drills become predictable and repetitive. Readiness declines. . . So today, we're convening the first in a series of hearings on this group of issues known as 'encroachment.' The term encroachment is

interest of national defense. The Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (hereinafter TSCA) (U.S. Code as of 01/02/01), was enacted by Congress to give EPA the ability to track the 75,000 industrial chemicals currently produced or imported into the United States. EPA repeatedly screens these chemicals and can require reporting or testing of those that may pose an environmental or human-health hazard. EPA can ban the manufacture and import of those chemicals that pose an unreasonable risk. Also, EPA has mechanisms in place to track the thousands of new chemicals that industry develops each year with either unknown or dangerous characteristics. EPA then can control these chemicals as necessary to protect human health and the environment.

62. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 145 (1981).

used because these developments gradually operate to crowd out the large scale, realistic training indispensable to force readiness.⁶³

Throughout the Encroachment Hearings, testimony was received from top military commanders, who provided specific examples of "encroachment." In regard to compliance with the ESA, General Jumper, Commander, Air Combat Command, U.S. Air Force, testified,

Currently, 79 federally listed threatened and endangered species are on approximately nine million acres of AF [Air Force] lands and waters. These include various species of mammals, reptiles, amphibians, and plants. In some cases, our installations and ranges are the only large, undeveloped, and relatively undisturbed areas remaining in growing urban areas. This often leaves AF lands as the last refuge in the region that can support endangered species. Biological Opinions resulting from re-

quired Endangered Species Act assessments have resulted in range and airspace restrictions mainly associated with aircraft noise and munitions use. We operate with altitude restrictions because of the noise and its possible effects on endangered species in Arizona, Texas and New Mexico.⁶⁴

General Jumper concluded, "[t]he cumulative effects of endangered species, noise sensitive areas, and population expansion have resulted in less than optimum training opportunities for our aircrews and constrained testing of weapon systems Presently, many units are routinely denied the full range of airspace required for practicing modern tactics, causing an impact to readiness."⁶⁵

Similarly, commanders from the Navy, the Army and the Marine Corps testified to the diminishing readiness in the military for national defense caused by "encroachment," focusing upon the difficulty of compliance with the ESA, the Marine Mammal Protection Act,⁶⁶ the Migratory Bird Treaty Act,⁶⁷ the

63. *Encroachment Hearings*, *supra* note 12 (opening statement of Representative Dan Burton, Chairman of the Comm on Gov't Reform), at http://www.house.gov/reform/hearings/05.09.01/opening_statement.htm (last visited on Nov. 1, 2001).

64. *Id.* at 7-8.

65. *Id.* at 12, 15.

66. Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421(h) (hereinafter MMPA) (U.S. Code as of 01/02/01). *Encroachment Hearings*, *supra* note 12 (testimony of General Jumper, Commander, Air Combat Command, U.S. Air Force), at <http://www.house.gov/reform/military/jumper.htm> at 1 (last visited on Jan. 20, 2002); The Act established a moratorium, with certain exceptions, on the taking of marine mammals in U.S. waters and by U.S. citizens on the high seas, and on the importing of marine mammals and marine mammal products into the United States. Under the MMPA, the Secretary of Commerce is responsible for the conservation and management of pinnipeds (other than walruses) and cetaceans. The Secretary of the Interior is responsible for walruses, sea and marine otters, polar bears, manatees and dugongs. The Secretary of Commerce delegated MMPA authority to the National Marine Fisheries Service ("NMFS"). Part of the responsibility that NMFS has under the MMPA involves monitoring populations of marine mammals to make sure that they stay at optimum levels. If a population falls below its optimum level, it is designated as "depleted," and a conservation plan is developed to guide research and management actions to restore the population to healthy levels. The MMPA allows the incidental, but not intentional, taking, by U.S. citizens en-

gaged in activities other than commercial fishing, of small numbers of depleted as well as non-depleted marine mammals under certain circumstances. Since the 1994 amendments became law, NMFS has published several regulations implementing the requirements under the Act. These include the general authorization for scientific research, the new management regime for governing the incidental taking of marine mammals in commercial fisheries, the prohibition on intentional lethal take in commercial fishing, the prohibition on approach closer than 100 yards to humpback whales in Hawaii, and consolidation of regulations for special exception permits to take, import, export, or carry out any other otherwise prohibited act involving marine mammals for the purpose of scientific research or enhancement for the survival or recovery of a species or stock.

67. Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (hereinafter MBTA), establishes a prohibition, unless permitted by regulations, to "pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention . . . for the protection of migratory birds . . . or any part, nest, or egg of any such bird." 16 U.S.C. § 703. This prohibition applies to birds included in the respective international conventions between the U.S. and Great Britain, the U.S. and Mexico, the U.S. and Japan, and the U.S. and Russia.

Clean Air Act, and by the presence of cultural resource and archeological sites.⁶⁸ The Army's Lt Gen. Larry Ellis testified,

[R]eadiness is critical to our ability to perform the missions assigned to us and to do so efficiently and with minimum casualties . . . The Army's primary encroachment concerns are urban sprawl, threatened and endangered species, and restrictions on the use of munitions. Army training is also affected by restrictions due to air quality standards, erosion control requirements, water quality standards, and restrictions on wetland impacts . . . Army lands host 153 federally listed species on 94 installations; 12 installations have lands designated as critical habitat (four of these habitats are as yet unoccupied by the species for which designated).⁶⁹

Examples of threatened and endangered species include the red-cockaded woodpecker, the black-capped vireo and the golden-cheeked warbler. The net effect is to restrict training on tens of thousands of acres.

Lt. Gen. Ellis also noted,

The many T&E plants in Hawaii and the complexities of complying with the Endangered Species Act have prevented the use of a valuable multi-purpose range built in 1988 at the Army's Pohakuloa Training Area on the Island of Hawaii. We have also voluntarily closed our only large caliber firing range at Schofield Barracks on the Island of Oahu-Makua Valley-while we review cultural resource and ESA management plans and agreements.⁷⁰

68. *Encroachment Hearings*, *supra* note 12 (testimony of Admiral William J. Fallon, Vice Chief of Naval Operations; Lt. General Larry Ellis, Deputy Chief of Staff for Operations and Plans, U.S. Army; and Major General Edward Hanlon, Jr. U. S. Marine Corps), at <http://www.house.gov/reform/military/military/index.htm> (last visited on Jan. 20, 2002).

69. *Id.* (testimony of Lt. General Larry Ellis, Deputy Chief of Staff for Operations and Plans, U.S. Army), at <http://www.house.gov/reform/hearings/05.09.01/ellis.html> (last visited on Jan. 20, 2002).

70. *Id.*

71. Letter from the House of Representatives, Committee on Gov't Reform, to the President of the United

After the hearing, the Government Affairs Committee, House of Representatives, sent President Bush a letter dated May 24, 2001, summarizing its eight months of field investigation and the testimony provided on May 9, 2001 at the Encroachment Hearings. The letter informs the President of the following key points: 1) military readiness depends on realistic training; 2) the availability of realistic training areas is eroding; 3) combat training is being hemmed in by commercial development, environmental regulations, airspace restrictions and conflicts over use of the radio frequency spectrum; 4) compliance with state and federal environmental regulations has become more complex and more costly; 5) the burden of protecting wildlife and habitat may be overwhelming the primary training mission at many bases; 6) the Clinton Administration studied these issues, but made no real proposals for long-term solutions; 7) these problems are affecting the ability of our forces to fight, and this Administration needs to tackle this problem before it gets out of control.⁷¹

The May 24, 2001 letter to President Bush concludes, "In our view, the issue is not readiness versus the environment, or readiness versus development, or readiness versus commercial aviation. We should not have to choose. The central question before us is how all these important national interests can be advanced in a balanced cooperative way."⁷² The Committee urged the President to initiate government reforms that address this interconnected set of problems "before the situation deteriorates further."⁷³

States, George W. Bush (May 24, 2001), at <http://www.house.gov/reform.html> (last visited on Nov. 1, 2001).

72. *Id.*

73. *Id.* The House of Representatives, Armed Services Committee, Military Readiness Subcommittee, was also studying the "encroachment" issue in the summer of 2001. In a press release issued on May 22, 2001, at the start of its hearing, the Subcommittee stated, "The DoD's need and desire to be a good neighbor, as well as an environmental steward, can collide with its need to train. The urbanization of neighborhoods surrounding military bases, the movement of endangered species onto military facilities, and the competing interests for the radio frequency spec-

B. Efforts to Increase the Military's Environmental Compliance

At the same time that the DoD was seeking solutions to its encroachment concerns, and Congressional committees were focused upon solutions that would provide relief from compliance requirements of environmental laws, efforts were also underway to strengthen environmental compliance by the military.

On June 13, 2001, U.S. House of Representatives Filner, McKinney, Pelosi, Degette and Lewis introduced a bill entitled the "Military Environmental Responsibility Act," H.R. 2154, the purposes of which were 1) to require the DoD and all other defense-related agencies of the United States to fully comply with federal and state environmental laws, including certain laws relating to public health and worker safety, that are designed to protect the environment and the health and safety of the public, particularly those persons most vulnerable to the hazards incident to military operations and installations; 2) to entirely waive any and all sovereign immunity and entirely revoke any and all exemptions of the DoD and all other defense-related agencies of the U.S. within the United States and abroad that might in any way limit or exempt those agencies from complying with all fed-

trum all fall under the broad category referred to as 'encroachment.' This hearing will focus on encroachment in the environmental arena; and in this context, the effect encroachment has on our training and readiness levels. There is a cost to compliance, and that cost is more than financial." The press release continued, "let me summarize for you an example from the Marine Corps. In March and April of this year the Marines conducted a large scale amphibious exercise on Camp Pendleton. However, one landing team could not land on the beach because it would disturb a riparian habitat that supports several endangered species. Movement between the beach and the highway was limited to two single lane roads due to the presence of an archaeological site. On a second beach a light armored reconnaissance Company was degraded from a tactical movement to an administrative movement due to restrictions imposed for endangered species. A tactical mission across a third beach was cancelled again because of endangered species concerns, as well as the inability to penetrate the highway and noise concerns from the adjacent community. The support unit could not exercise its ability to move supplies from beach inland by helicopter because of airspace restrictions along the highway. Finally, lead infantry units ashore and moving inward could not establish

eral and state environmental laws designed to protect the health and safety of the public or the environment; and 3) to leave no ambiguity for the executive or judicial branches that the DoD and all other defense-related agencies are fully subject to all the requirements and possible enforcement of all federal and state environmental laws designed to protect the health and safety of the public or the environment.

This bill, if passed, would eliminate all the defense and national security exceptions and exemptions from all environmental laws,⁷⁴ and make the DoD accountable for environmental compliance on the exact same basis as any private citizen or corporation. This would mean a complete waiver of sovereign immunity, unitary executive privilege, and the requirement to comply with all of the local, state and federal environmental laws.⁷⁵

The battle lines were being drawn, and a showdown over the environmental impacts of military training was being staged. The outcome was uncertain.

V. September 11, 2001.

On the morning of September 11, 2001, terrorists attacked the World Trade Center

gun positions in the beach and provide fire support to advancing infantry because of airspace constraints. The exercise was at best fragmented, and at worst, ineffective." At <http://www.house.gov/hasc/pressreleases/2001/01-05-22weldon.html> (last visited on Jan. 20, 2002).

74. The bill did allow for the President and certain federal agency heads to request exemptions (such as for national security), but only for a specific period of time, not to exceed 180 days, unless extended by Act of Congress.

75. Representative Filner, the author of the bill, is a representative from the San Diego district. According to the Committee Opposed to Militarism and the Draft, in September 2000, the Marines spilled over 2 million gallons of sewage into the ocean, but no fines were assessed because of sovereign immunity. The Navy's current dredging project has violated its permit twice and in the past few years the Navy has spilled over 15,000 gallons of oil in the coastal water. *Support the "Military Environmental Responsibility Act,"* at http://www.comdsd.org/article_archive/mera_article.htm (last visited on Nov. 2, 2001). These instances of environmental pollution and noncompliance may have led Representative Filner to seek legislation to protect the beauty of the San Diego area.

towers in New York City, and the Pentagon.⁷⁶ Terrorists also hijacked a plane that crashed in a field in Pennsylvania, short of its intended target.⁷⁷ By the afternoon of September 11, 2001, U.S. officials had determined that Saudi exile Osama bin Laden was involved in the attacks.⁷⁸ On the evening of September 11, 2001, President Bush addressed the nation, saying “thousands of lives were suddenly ended by evil” and asked for prayers for the families and friends of the victims. “These acts shattered steel, but they cannot dent the steel of American resolve,” he said. The president also said that the U.S. government would make no distinction between the terrorists who committed the acts and those who harbor them.⁷⁹

The United States’ response to the September 11, 2001 terrorist attacks has proceeded on several fronts, including military action. On September 20, 2001, President Bush stated, “We will direct every resource at our command — every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war — to the

destruction and to the defeat of the global terror network. . . I have a message for our military: Be ready. I have called the armed forces to alert, and there is a reason.”⁸⁰

VI. The “War on Terrorism”.

Terrorism is defined by the DoD as, “The calculated use of unlawful violence or the threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”⁸¹ The U.S. treats terrorism committed by persons not acting for a nation-state as crimes to be addressed by domestic law enforcement authorities.⁸² The U.S. is a party to a number of international treaties relating to forms of terrorism, but most of these conventions treat the acts as crimes and require the parties to establish criminal jurisdiction over offenders.⁸³ Terrorism committed by a nation-state is ordinarily considered a national security issue to be addressed by the armed forces.

76. September 11, 2001: 8:45 a.m. EDT: A hijacked passenger jet, American Airlines Flight 11 out of Boston, Massachusetts, crashed into the north tower of the World Trade Center, tearing a gaping hole in the building and setting it on fire. 9:03 a.m.: A second hijacked airliner, United Airlines Flight 175 from Boston, crashed into the south tower of the World Trade Center and exploded. 9:43 a.m.: American Airlines Flight 77 crashed into the Pentagon, sending up a huge plume of smoke and fire. 10:10 a.m.: United Airlines Flight 93, also hijacked, crashed southeast of Pittsburgh, Pennsylvania. 10:10 a.m.: A portion of the Pentagon collapsed. 10:28 a.m.: The World Trade Center’s north tower collapsed from the top down, releasing a tremendous cloud of dust and smoke. 2 p.m.: Senior FBI sources tell CNN they are working on the assumption that the four airplanes that crashed were hijacked as part of a terrorist attack. At <http://www.cnn.com/2001/US/09/11/chronology.attack/index.html> (last visited on Jan. 20, 2002).

77. CNN Senior White House Correspondent John King reported on September 11, 2001 that U.S. officials say the plane that crashed in Pennsylvania could have been headed for one of three possible targets: Camp David, the White House or the U.S. Capitol building. At <http://www.cnn.com/2001/US/09/11/chronology.attack/index.html> (last visited on Jan. 20, 2002).

78. CNN National Security Correspondent David Ensr reported that U.S. officials say there are “good indications” that Saudi militant Osama bin Laden, suspected of coordinating the bombings of two U.S. embassies in 1998, is involved in the attacks, based on “new and specific” in-

formation developed since the attacks. Osama bin Laden is believed to be conducting his terrorist activities from a location in Afghanistan. At <http://www.cnn.com/2001/US/09/11/chronology.attack/index.html> (last visited on Jan. 20, 2002).

79. At <http://www.cnn.com/2001/US/09/11/chronology.attack/index.html> (last visited on Jan. 20, 2002).

80. Address by President George W. Bush to a Joint Session of Congress and the American People. (September 20, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited on Jan. 20, 2002).

81. Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms* (April 12, 2001, as amended through October 15, 2001), at 444 http://www.dtic.mil/doctrine/jel/new_pubs/jpl_02.pdf (last visited on Jan. 20, 2002).

82. See, FindLaw, *Special Coverage: America Attacked*, at <http://news.findlaw.com/legalnews/us/terrorism/laws.html> (last visited on Jan. 20, 2002) (listing U.S. laws related to terrorism). The arrest, prosecution and conviction of terrorist Timothy McVeigh for his participation in the bombing of the federal building in Oklahoma City was handled by domestic law enforcement, not the military.

83. See, U.S. Department of State, *International Terrorism Conventions* (August 17, 1998), at http://www.state.gov/www/global/terrorism/980817_terror_conv.html (last visited on Jan. 20, 2002).

On October 7, 2001, the United States began its "war on terrorism." On the orders of President Bush, "the United States military . . . [began] strikes against terrorist training camps of al Qaeda and military installations of the Taliban regime in Afghanistan. These carefully targeted actions [were] designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime" ⁸⁴ President Bush further stated,

In the months ahead, our patience will be one of our strengths . . . patience in all the sacrifices that may come. Today, those sacrifices are being made by members of our Armed Forces who now defend us so far from home, and by their proud and worried families. A Commander-in-Chief sends America's sons and daughters into a battle in a foreign land only after the greatest care and a lot of prayer. We ask a lot of those who wear our uniform. We ask them to leave their loved ones, to travel great distances, to risk injury, even to be prepared to make the ultimate sacrifice of their lives. They are dedicated, they are honorable; they represent the best of our country. And we are grateful. To all the men and women in our military — every sailor, every soldier, every airman, every coastguardsman, every Marine — I say this: Your mission is defined; your objectives are clear; your goal is just. You have my full confidence, and you will have every tool you need to carry out your duty. ⁸⁵

On November 9, 2001, the President, again speaking to the nation, said that there was no doubt the United States is a "different

country than we were on Sept. 10, sadder and less innocent, stronger and more united" ⁸⁶ While the September 11 terrorist attacks shocked and horrified the nation—and many felt "our lives would never be the same—the country has come together in an unprecedented manner. What we couldn't be sure of then—and what the terrorists never expected—was that America would emerge stronger, with a renewed spirit of pride," he said. The president said the U.S. military is carrying out its mission of rooting out the Taliban and al Qaeda. President Bush further stated, "I am so proud of our military . . . We are deliberately and systematically hunting down those murderers and we will bring them to justice," he said. "We wage a war to save civilization itself. We did not seek it, but we will fight it and we will prevail . . . We have our marching orders. My fellow Americans, let's roll," ⁸⁷ Bush said.

By November 13, 2001, "roll" we had, resulting in a much-accelerated collapse of Taliban forces throughout Afghanistan. No one predicted this rapid a collapse. In little more than a month of fighting, the U.S. air strikes in Afghanistan, which began with the destruction of a terrorist training camp, a surface-to-air-missile site, and damage to an airport in early October 2001, had progressed to comprehensive operations including missile and air attacks, coordinated ground attacks with support from U.S. special forces and intensified air strikes, resulting in this rapid military success. This decisive progress was said to be the result of superior air power and the insertion of Special Forces, which gathered intelligence from opposition forces and began to mark targets for air strikes, as well as the ground action by the Northern Alliance forces itself. ⁸⁸

84. Presidential Address to the Nation (October 7, 2001), at <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> (last visited on Jan. 20, 2002).

85. *Id.*

86. President Bush, Speech of November 9, 2001, at http://abcnews.go.com/sections/politics/DailyNews/bush_speech011108.html (last visited on Jan. 20, 2002).

87. President Bush was referencing the last words heard from Todd Beamer, one of the passengers of United Airlines flight 93, that crashed into a field in Pennsylvania,

after the passengers united to overtake the terrorist hijackers and prevent the plane from being used to crash into its intended target.

88. CNN.com military news reports contain updates as the war progresses. See, Press Release of Defense Secretary Rumsfeld, predicting a very long, ultimately successful war on terrorism: "In the end, war is not about statistics, deadlines, short attention spans, or 24-hour news cycles. It is about will — the projection of will, the clear, unambiguous determination of the President and the American peo-

VII. The September 11/War on Terrorism Paradigm Shift: Military Wins All?

The terrorist attacks on America on September 11, 2001, and the resulting "war on terrorism" against the Taliban, al Qaeda and Osama bin Laden, may have impacted the outcome of the policy conflict that was brewing during the summer of 2001 between the military and the environmentalists. In May, Maj Gen. Hanlon, U.S. Marine Corps, concluded his testimony at the Encroachment Hearings by stating, "With your help, I am confident that we can achieve and maintain the appropriate balance between military readiness and competing demands for scarce resources. If we cannot achieve the right balance, if we restrict our training and cannot closely duplicate the real battlefield, if we cannot train as we fight, I am convinced that the price we pay for success in combat will be unnecessarily high, a price that will be paid by our Nation's sons and daughters."⁸⁹

Now that the country is at war, and the news carries a continuous stream of pictures of our military forces prepared to battle the evils of terrorism, the warning of the military commander has more impact. The necessity for training and preparing for war seems suddenly more important, and the military is increasing its cry for readiness. Just as suddenly, the American people may be ready to accept more environmental impact in the

name of national security, in order that the forces that are sent into battle do so with the training necessary for them to achieve their objective and return home safely. Because of this concern about the success of the war on terrorism, "Operation Enduring Freedom," and the safety of the Americans sent to fight that war, the line between protection of the environment and a strong national defense may have shifted. Will that shift go too far, with significant destructive impact to the environment? Will the old paradigm return, where the environment is sacrificed for the good of the national defense, or do we now understand that a healthy environment is as important as a strong military, and that we can have both?

The terrorist attacks have caused a paradigm shift.⁹⁰ While I think it an overstatement to view the tragic events as "innocence lost"⁹¹ the events of September 11 have certainly changed the United States. This attack has demonstrated that no country, now matter how powerful it believes itself to be, is immune from the terror caused by such evil acts. That the Pentagon, the symbol of our military strength, could be attacked and badly damaged in broad daylight, by one of our own commercial planes, was a tremendous shock. That the World Trade Centers, the symbol of our economic strength, could be destroyed in such a short time, with such per-

ple to see this through to certain victory. In other American wars, enemy commanders have come to doubt the wisdom of taking on the strength and power of this nation and the resolve of her people. I expect that somewhere, in a cave in Afghanistan, there is a terrorist leader who is, at this moment, considering precisely the same thing." News Release No. 560-1, November 1, 2001, at <http://www.defenselink.mil/pubs/almanac/osd.html>.

89. Encroachment Hearings, *supra* note 12 (testimony of Major General Edward Hanlon, Jr. U. S. Marine Corps), at <http://www.house.gov/reform/hearings/05.09.01> (last visited on Jan. 14, 2002).

90. "Paradigm shift," as used here, is based upon Thomas Samuel Kuhn's theory of a paradigm, which he described as essentially a collection of beliefs shared by scientists or a set of agreements about how problems are to be understood, with a developmental pattern of a mature science being the successive transition from one paradigm to another through a process of revolution or "paradigm shift." T. Kuhn, *The Structure of Scientific Revolution*

(1962). Used in a broader perspective, as here, paradigm shift refers to the accumulation of a significant body of knowledge or information that is contradictory to or unexplained by the accepted paradigm, or "world view." Hanna Cortner and Margaret Moore, *The Politics of Ecosystem Management* (1999) at 39.

91. I find it more compelling to think of "innocence lost," if it ever existed, with the bombing of the federal building in Oklahoma, or the shooting of ATF agents by David Koresh and the Branch Davidians at Waco, Texas. What could be worse than to be terrorized by "one of your own?" See also, Karen Armstrong, *The Battle for God*, Ballantine Books (2000), in which the author examines the recent rise of the fundamentalist groups in Christianity, Islam and Judaism, and the militant factions within the fundamentalist groups that have gunned down doctors, set off explosives at women's health clinics, terrorized women, and even shot their president. She warns that we ignore the militant fundamentalists at our peril.

sonal devastation, caused all citizens to feel insecure and vulnerable.⁹²

One significant aspect of the paradigm shift has been the amazing "rush to patriotism." The most important item to place outside one's home or on one's car these days is "Old Glory." Some cars have two, or three or even more flags attached to the windows and doors. Even Dale Earnhart, Jr., upon winning a NASCAR victory in the first auto race after September 11, 2001, asked his crew for the "huge" American flag from center field, and, instead of doing the usual "smoking up the tires," he carried the American flag high and proud around the track, as the crowd stood, roared and saluted. Even the track's music manager was on the ball, and instantaneously located some patriotic music to play during Junior's slow celebratory, flag waving drive around the track.⁹³

More than 40,000 people turned out to see the 2001 Veteran's Day Parade in down-

town Las Vegas, piling out of the casinos to check a glimpse of girl scouts, boy scouts, Junior ROTC, ROTC, current military members and veterans, along with all the politicians that one parade could hold.⁹⁴ There were also firemen and fire trucks, policemen and police cruisers, military vehicles and a fly-over by two Air Force F-16's.

Another aspect of the new paradigm is that the military is popular again. No longer is the military viewed as an expensive, noisy nuisance, and recruiters are having difficulty keeping up with the number of persons wishing to volunteer for military service. There has been little talk of reducing the defense budget, and the defense budget for FY 2002 has been approved at a level not seen in several years.⁹⁵

Because of this rush to patriotism, the military may have regained its national security trump card. During World War II, it would have been impossible to curb General Pat-

92. A few responses (in the British press) to the question of "Has the World Changed?" follows: *Rabbi Jonathan Sachs, Chief Rabbi of the United Hebrew Congregations of the Commonwealth*: "Yes, the world has changed, and with a speed and tragedy no one expected. Until September 11th globalization was a vague concept, to do with intangibles like the weather, the international economy and Naomi Klein's "No Logo." We now know it means the abolition of distance. A remote conflict can suddenly explode into our lives, with no forewarning and no apparent logic." *Sir Michael Howard, emeritus professor of history at Oxford and Yale universities*: "The world did not suddenly change on September 11th. We simply woke up to the realisation that a significant number of people regard our secular and materialist civilisation as decadent and evil and are prepared to go to any lengths to destroy it. Such people have existed for a long time; not only in the Moslem world - American fundamentalism and European Fascism have also bred them - and not only among the wretched of the earth. What is new is their capacity to cause really significant damage." *Studs Terkel, veteran US journalist*: "In America the first reaction was fear and rage. But through the realisation that we are not the impregnable fortress, comes an understanding of what it means to be terrorised. For us war was elsewhere, yet the Pentagon brags about having been engaged in 250 military adventures - more than any empire. When we dropped the bomb on Saddam (who, ironically used to be one of our boys), we didn't get him, but we got some Iraqi kids. It was the same with Noriega in Panama. Perhaps, since last month's horrendous attacks, we have more empathy and awareness of others and are not so far removed from the rest of the world. I feel a little less pessimistic. Now when people see that infamous photograph of the young Vietnamese girl running from the napalm, they might possibly relate it to one of their kids." *Neal Ascherson, journalist and historian*: "The great tragedy and crime of Sep-

tember 11 leaves the United States a smaller country. It did not so much change the world as make violently clear a new context of power which has been developing since 1989. The picture of the USA as the world's hegemonic superpower is wrong . . . From now on, challenges to America's reduced authority - some rational and political, some fanatical and violent - will keep on coming. The "global war on terrorism" is only one side of a two-way conflict." *Lord Bikhū Parekh, academic and chair of the commission on the future of multi-ethnic Britain*: "September 11 was certainly a turning point in the history of international terrorism. Casualties were higher and more multi-ethnic than ever before, the manner of inflicting them was spectacular, and the targets were of great symbolic significance. The evident linkage between the remote mountains of one of the most backward nations, and the sophisticated nerve centres of the most advanced nation, dramatically demonstrated humanity's inescapable interdependence and shared fate." At <http://www.guardian.co.uk/waronterror/story/0,1361,567172,00.html> (last visited on Jan. 20, 2002).

93. At <http://www.nascar.com/RACE/winston/27/2001/index.html> (last visited on Jan. 20, 2002).

94. At http://www.lvrj.com/lvrj_home/2001/Nov-12-Mon-2001/news/17427607.html (last visited on Jan. 20, 2002).

95. Congress and the President reached agreement on the total funding level for FY 2002 appropriations: \$686 billion (not including attack-related emergency funding), far more than the original \$661 billion Bush requested in April 2001. Congress and the President approved \$40 billion in additional emergency funds for war, terrorism, and relief-related costs. The FY 2002 DoD appropriations bill was approved at \$318 billion. At http://wire.ap.org/Annews/Center_package.html (last visited on Dec. 20, 2001).

ton's tanks because of excessive air pollution or to stop General MacArthur's beach assaults because of threats to endangered species.⁹⁶ Winning the war was foremost. The purpose of the military is to kill people and to break things in the national interest.⁹⁷ To think otherwise would be un-American. Today, it may be implausible to pass legislation that would increase environmental enforcement against the military. The Military Environmental Responsibility Act, proposed with fanfare in June 2001, has not moved through any congressional committee since September 11, 2001. It is likely dead for this session, at least.

A new paradigm exists in connection with the environmental impacts of military training. A specific example of the new paradigm can be seen in connection with litigation in Hawaii. After years of protests, community activism, and Congressional inquiries, suit was filed in 1998 against the U.S. Army by a community group, Malama Makua, ("malama" being the Hawaiian word for "care for" or "cherish."), alleging a failure to comply with NEPA in relation to training at Makua Military Reservation ("Makua"), a training range on the Waianae Coast of Oahu, state of Hawaii. The lawsuit was initially settled when the Army agreed to prepare additional NEPA documentation. The Army then completed a supplemental environmental assessment for live fire training activities at Makua. The plaintiffs, Malama Makua, filed suit again, alleging that an EIS should have been completed, instead of the supplemental environmental assessment. In July 2001, the federal district court issued a temporary injunction that prevented the resumption of military training at Makua.⁹⁸ A final hearing on motions for summary judgment in the litigation was scheduled for October 2001.

Makua is a beautiful valley adjacent to an unspoiled white beach and crystal clear blue ocean waters. The valley and beach are considered sacred by the Native Hawaiians. The training range contains a significant Native Hawaiian religious site, numerous secret burial caves and extensive habitation areas, including imus (underground cooking pits for the pigs). The Waianae coast of Oahu is primarily inhabited by Native Hawaiians. The beach and ocean are used by Native Hawaiians for subsistence fishing and gathering, and endangered marine mammals frequent the near shore and on-shore areas. The mountain ridges above the valley contain numerous species of threatened and endangered flora and fauna.

Many citizens in the community, including many Native Hawaiians, strenuously oppose the use of Makua Valley for military training. Also, because the military used a site in Makua in the past for the open burning and open detonation of waste ammunition and hazardous materials and waste, the Native Hawaiians are concerned about contamination from that site reaching their fishing and swimming area. The community also has a safety concern relating to the munitions, for in order to get to Makua for training the military travels, with troops and ammunition, through the middle of the town, alongside the elementary and high schools, on the only road which connects Makua to the rest of the island. Malama Makua seeks to stop the military from training at Makua, to force the return of "their land" which had been "stolen" from them by the illegal overthrow of the Hawaiian kingdom, and to cause the return of the property to its traditional and cultural uses.

On October 4, 2001, Malama Makua and the U.S. Army reached a settlement of the pending litigation. The Army immediately

96. Environmentalists, however, talk about the tank tracks still visible in the flats southeast of Needles, Calif., where General George Patton conducted training exercises during World War II. McKinnon, *supra* note 51.

97. Zillman, *supra* note 20.

98. Because of a voluntary shut down in training during a Section 7, ESA consultation with the U.S. Fish and

Wildlife, and later, pursuant to a settlement agreement between the parties of the initial lawsuit, the U.S. military had not been able to use Makua for live fire training since September 1998.

began training exercises at Makua. Despite years of protests, community hearings, court sessions and lengthy negotiations, it took acts of terrorism on September 11 to resolve this dispute. One of the leaders of Malama Makua, Sparky Rodrigues, indicated that the terrorist attacks on the World Trade Center and the Pentagon made the difference. "The world changed on the 11th of September. It changed a lot of things," he said. "That clouded the issue. 'Where do our loyalties lie?' people were asking. It was hard to separate Makua from what had happened on Sept. 11."⁹⁹ The Army also agreed that September 11 "presented us with a whole new set of circumstances. The issues that once divided us no longer seem as important as the cause that now unites us."¹⁰⁰

While the September 11 terrorist attacks triggered the settlement of this contentious litigation, EarthJustice Legal Defense Fund, the public interest environmental law firm that represented Malama Makua in the litigation, drove a hard bargain in the settlement. The Army agreed to prepare an Environmental Impact Statement, and to do so within three years. The Army also agreed to pay \$50,000 to Malama Makua so that the community group could hire independent experts to help in the EIS review process. The Army agreed to allow access to cultural sites in the valley, to clear unexploded ordinance within 3000 feet from the road that runs between the beach and the valley, to allow civilian observers during military training maneuvers in the valley to make sure that the "training restrictions" designed to protect cultural and natural resources are being followed, to provide long-term monitoring of the soil and water in the valley and to transport explosives, artillery and mortar rounds, anti-tank rounds and grenades by air, rather than by truck through the community, when possible. Additionally, training activities would be limited to sixteen (16) combined arms live-fire exercises in the

next year, nine (9) during the next year, and twelve (12) the following year.

U.S. Senator Daniel Inouye, who had supported the use of Makua for military training, but who also understood the community's concerns, was pleased with the resolution of the dispute. U.S. Senator Daniel Akaka was also happy, saying that the agreement produced a result that "balances the critical need to train with the need to preserve the environment and our cultural resources"¹⁰¹ While this was an exceptional result, in that the military was able to resume its needed live fire training, and the community was able to win the environmental information and protection they desired, that was only the result of the terrorist attacks of September 11, strong negotiation by the EarthJustice Legal Defense Fund and the resolve of the community. Additionally, the Army did not seek to invoke any special exemptions under the environmental laws, but agreed to prepare an EIS, satisfying the community's concerns.

Other less environmentally protective scenarios are possible because of the intense patriotism of the times. One would be for the military to rely upon "national security" exemptions or other "special" exceptions, even if not needed. In fact, on October 5, 2001, numerous members of the House of Representatives wrote to Secretary of Defense Rumsfeld regarding the "ongoing concern with the challenge of encroachment upon our military bases, test ranges and training facilities, and the negative effect this has had on combat readiness, effectiveness and safety."¹⁰² The letter states,

Our recent hearings have focused on this serious and growing problem. We are confident that you are well aware of the many examples we were provided where training effectiveness and reality have been sacrificed to bu-

99. Gregg Kakesako, *Tragedy in New York Lifts Makua Impasse*, Star-Bulletin, October 5, 2001, at <http://starbulletin.com/2001/10/05/news/story2.html> (last visited on Dec. 2, 2001).

100. *Id.*

101. *Id.* See also *Settlement is Receiving Wide Approval*, Star-Bulletin, October 5, 2001, at <http://starbulletin.com/2001/10/05/news/story2.html> (last visited on Dec. 2, 2001).

102. Letter of October 5, 2001 from the House of Representatives to the Secretary of Defense Donald H. Rumsfeld. (Letter on file with the author).

reaucratic strangulation, misguided litigation and 'feel good' environmentalism without a shred of science to support the decision. The story of soldiers 'taping off foxholes' instead of digging them would be funny if it were not true.¹⁰³

The letter specifically inquires as to the Department of Defense's position regarding the challenges it faces in complying with the ESA, as well as the policy for consideration of ESA exemptions and suggests the possibility of an ESA exemption being granted for local projects, on national security grounds. The letter ends with the pledge of "continued support to your efforts to rebuild our military, restore our national confidence and win the war against the scourge of global terrorism."¹⁰⁴

While the sentiment and concern is understandable, and the support for the military admirable, and part of the new paradigm,¹⁰⁵ we must not let the recent horrible events, and the need for a strong national defense, lead to poor environmental decisions. Even the language of the October 5, 2001, letter from the members of the House of Representatives to Secretary of Defense Rumsfeld with statements of, "misguided litigation and 'feel good' environmentalism without a shred of science to support the decision," shows the possible overreaching that the national security "trump card" might be able to exact.

103. *Id.*

104. *Id.*

105. An example of the paradigm shift toward the "military trump card" can be seen in the article by Michelle Malkin, *Hostile Fire From Eco-Extremists*, The Washington Times, Dec. 11, 2001, which begins, "Which is more important: Well-trained Navy pilots or well-rested toads? Increased military preparedness or increased antelope populations? Improved bombing facilities or improved fairy shrimp habitats?" The answer, at least to Ms. Malkin, was that the military training activities are most important, and that the environment should be sacrificed for that training. At <http://www.washtimes.com/commentary/malkin.html> (last visited on Dec. 12, 2001).

106. David Rubenson, 114 (1996).

107. While funding for environmental restoration and BRAC clean up averaged more than two billion dollars (\$2 billion) per year for FY 1993 to 2001, and environmental compliance funding averaged almost two billion dollars (\$2 billion) per year for FY 1993 to 2001, funding for conservation programs (natural and cultural resource protection, in-

However, this is not the best approach. The type of resolution that was reached in the dispute over military training in Makua Valley is a much better balanced result, with the military resuming live fire training, and the community's concerns over environmental protection resolved, without the use of any national security exemptions.

VIII. Environmentally Balanced Solutions: We Can Have Both

The focus of the military's "encroachment issues" involves compliance with environmental laws relating to the "conservation" pillar of the DoD's environmental program. These natural and cultural resource management issues have a direct effect on the military mission and have therefore emerged as DoD's most fundamental environmental challenge.¹⁰⁶ However, the issues of hazardous waste management and hazardous waste cleanup have received the dominant focus and share of funding from the DoD budget over the past several years.¹⁰⁷ Those issues are separate from the military training mission and currently function under carefully regulated procedures.¹⁰⁸

The conservation pillar is chronically underfunded,¹⁰⁹ and this underfunding needs to be addressed.¹¹⁰ Compliance with the NEPA, ESA, NHPA, MMPA, and MBTA have the ability to cause the most restrictions on testing

cluding compliance with ESA, MMPA, NHPA, NEPA) averaged less than one hundred million (\$100 million) per year for FY 1991-2001. See *supra*, section IIIA-III D.

108. Compliance with statutes designed to clean up past environmental damage, and to limit new environmental damage from hazardous waste production and disposal, such as CERCLA, RCRA, EPCRA, and other similar laws have not caused a decline in military readiness, and should be enforced with no changes.

109. Rubenson, *supra* note 106.

110. One notable, recent exception to the under funding for conservation requests is the seventy five million dollars (\$75 million) that Congress recently allocated to the U.S. Army for use in working with the U.S. Dep't of Interior for conservation programs to protect the desert tortoise in connection with the expansion of Ft. Irwin, CA's National Training Center, H.R. Cong. Rec. H12262, Dec. 15, 2000. Section 323 (c)(3), at <http://fortirwinlandexpansion.com/HR%205666%20Section%20323.pdf> (last visited on Jan. 20, 2002).

and training, and yet requests for funding for compliance with these laws are generally met with resistance. Because of the relatively few laws that are leading to the military's "encroachment issue," a narrow approach focused upon resolving that conflict would be the best approach, rather than an overly broad approach, such as to exempt the military from compliance with all environmental laws, or the opposite, a law to eliminate all exemptions, such as proposed in the Military Environmental Responsibility Act.

In addition to properly funding the conservation pillar of the DoD's environmental program, a continued reliance on the balanced approach that is already contained within the environmental laws, in the form of certain exemptions, exceptions and waiver procedures that can be invoked in the interest of national security if needed, should be maintained.¹¹¹ However, certain of the laws, such as the MMPA and the MBTA, do not currently contain specific exemptions for national security concerns. Additionally, although the NHPA has a "national security" exemption, that exemption is only for section 110 of NHPA, and not for section 106, which requires consultation with the State Historic Preservation Officer if the proposed federal action may affect a historic site. Therefore, the balanced approach may include adding exemptions, through legislative amendment, for NHPA section 106, MMPA and MBTA. Then the exemptions should be invoked only if needed. If additional exemptions are needed in the laws that already include exemptions, specific legislation for those expanded exemptions should be sought.

In practice, there are many ways in which the exemptions could be implemented. For example, if an exemption is needed for the military to conduct training activities in a location that includes endangered species, and the training may impact the species, the DoD might request and be granted a "special incidental take" permit. That permit may require, as a trade off for the training, an increase in national marine sanctuaries to compensate

for the marine mammals lost during the training activities. In situations such as Hawaii, where the only remaining species of plant are located on military training ranges, increased genetic banking and transplantation into protected national refuges may be required. Sanctuaries for endangered species may need to be increased to compensate for some "takes" under the ESA, along with increased funding, through the Legacy Program, for ecosystem management and study.

In compliance with the NHPA, a dramatic increase in funding may be required to increase and complete surveys and recovery of important artifacts of importance to Native Hawaiians, American Indians and Alaska Natives and for other cultural and historic properties and artifacts. This increased effort at completing the surveys and recovering or safeguarding artifacts would substantially decrease the impacts to military training that the military is now facing.

In connection with NEPA compliance, the additional emphasis on incorporating environmental planning considerations into all federal actions, including military operations, which has been occurring in recent years, should be continued. With that focus, NEPA compliance issues should be satisfactorily met, as long as proper funding is provided. If national security issues require expedited consideration, the alternative procedure that is already contained within NEPA should be applied. This would require planning and analysis to the extent possible before the implementation of the proposed actions, with completion of the analysis afterward.

IX. Conclusion.

The important policy issue of finding the correct balance between the country's need for a strong national defense, and protection of the environment, has as its background context the feeling of security or insecurity by the American people. During WWII and the Cold War era, little consideration was given to the extent of environmental damage that

111. For a listing and description of the exemptions and exceptions, *see supra*, section IV.

occurred as a result of preparing and fighting the nation's wars. Even the "environmental movement" of the 1970's to 1990's had very little impact on the military's methods of preparing for war. With the end of the Cold War in 1989, and the gathering strength of the environmental movement, the DoD hit a low point of environmental protection at the same time that the American people felt a high point of feeling secure and having concern for the environment. The conflict between these two positions brought about a substantial change in how the DoD conducted its business of preparing to fight the nation's wars. This resulted in the development of programs by the military to clean up past contamination, prevent future pollution, work within the framework of pollution controls, and protect the natural and cultural resources of the nation. This change was a result of work by environmental groups, lawsuits brought under citizen suit provisions of environmental laws, regulatory enforcement by EPA and state regulators, and a changing ethic within the DoD. The DoD began to see that a clean and healthy environment was a very important value for the American people.

However, as the DoD increased its compliance with environmental laws, it was finding that compliance with the laws, particularly protection of natural and cultural resources, was seriously impacting its ability to prepare for the nation's defense. Throughout the summer of 2001, the DoD was discussing the possibility of seeking legislative changes to the environmental laws to lessen the burden on the military of some of the key environmental laws, including the ESA. On the other hand, those concerned with protecting the environment were not sufficiently satisfied with the military's compliance in some respects, such as complying with NEPA, and were continuing to bring lawsuits to enforce compliance. They were also seeking legislative changes to require further compliance, and to eliminate the existing exemp-

tions and exceptions. One example of legislation that was being considered was the Military Environmental Responsibility Act. Both sides were using the legislative process to further its position, with environmental groups also using litigation to force additional compliance with the environmental laws.

Then came the terrorist attacks of September 11, 2001, the resulting increase in the feeling of national insecurity, and the tremendous rise in patriotism. This paradigm shift may result in a swing for the military in this policy conflict. But the shift will not bring us back to the old paradigm, where the environment was sacrificed in the name of national security. There are now strong environmental laws, and these laws have become familiar to the American people. Not only are the American people knowledgeable about the environmental laws, they regularly read and discuss environmental issues, and are concerned about the health and safety of their environment. The American public will remain vigilant to keep in the forefront that a safe and clean environment may be as important as a strong national defense.

Additionally, if there must be environmental destruction committed in the name of the national defense, the American people will require, through enforcement of NEPA, to be informed of the trade-off to the extent possible, and will require that they be given an opportunity to provide information about the trade-offs. If the environmental damage cannot be avoided, the American people want to be able to understand the trade-off, and to understand that there was no other reasonable alternative.

We can have a strong national defense and a strong environmental protection policy.¹¹² Our understanding and knowledge of the importance of a healthy environment will prevent a backslide into the old paradigm. We will, because we must, keep our eyes on the bottom line, "What good to fight and win

112. As Secretary of Defense Dick Cheney stated clearly in 1990, and which remains true today, "Defense and the environment is not an either/or proposition. To choose between them is impossible in this real world of

serious defense threats and genuine environmental concerns." Address of Dick Cheney to the Defense and Environment Initiative Forum, Washington, D.C. Sept. 3, 1990 (cited in Dycus, *supra* note 5, at 2).

the war on terrorism, if the environmental damage done at home destroys that which we fight to protect?" One is reminded again that though the war on terrorism, just as World War II, may be necessary and just, "What price the environment for the violence of human-kind?" With continued emphasis on and compliance with environmental laws by the DoD, that price may be less than during the Cold War era, and one that the American people will support. Now, if only we could solve the root problem, the "violence" of human-kind!¹¹³

113. Unfortunately, Plato may be correct:

Only the dead have seen the end of war.

—Plato

At <http://www.dankohn.com/quotes.html>.

